



Ofcom's policy on
information gathering under
section 145 of the
Communications Act 2003 and
section 13B of the Wireless
Telegraphy Act 1949

Consultation document

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Section 1

Summary

- 1.1 This consultation seeks views on Ofcom's proposed general policy regarding its use of the statutory information gathering powers contained in sections 135 and 136 of the Communications Act 2003 ("the 2003 Act") and section 13A of the Wireless Telegraphy Act 1949 ("the 1949 Act"). Details of when responses to this consultation should be provided by and the next steps in the process can be found in Section 5 below.
- 1.2 The proposals set out in this document are intended to achieve two main goals. First, to fulfil Ofcom's obligations under section 145 of the Communications Act and section 13B of the Wireless Telegraphy Act to prepare and publish a statement of general policy with respect to:
 - (a) the exercise of powers under sections 135 and 136 of the 2003 Act and section 13A of the 1949 Act; and
 - (b) the uses to which it proposes to put information obtained under those sections.
- 1.3 Second, to provide clarity to stakeholders as to how and when Ofcom will use its statutory powers to require the provision of information and when it will instead informally request that information be provided.
- 1.4 This document sets out Ofcom's proposed general policy on the use of its statutory information gathering powers. Where appropriate, Ofcom reserves the right to deviate from this general policy. Where it does deviate from this general policy, Ofcom will set out its reasoning for doing so.

Proposed general policy

- Ofcom will seek all the information that it needs to investigate the potential breach of a condition of entitlement (based either on a complaint or "own initiative" investigation) using its statutory powers under sections 135 and 136 of the 2003 Act.
- In the case of other types of information which could be required under sections 135 and 136 of the 2003 Act or under section 13A of the 1949 Act, e.g. information to carry out a market review or information required in connection with exercising spectrum management functions, Ofcom will generally request information on an informal basis, without recourse to its statutory powers. However, Ofcom will consider using statutory powers if it believes it appropriate to do so.
- Any demand for information under statutory powers will be sent in the form of a notice to the person from whom the information is being requested. The notice will contain details of the information required, the reasons for requesting that information and the purpose that the information is required for. It will also set out the date by which the information must be provided.

- Where timescales allow and it is appropriate to do so, Ofcom will send a draft of the information notice to the person holding the relevant information for comment. Following receipt of comments Ofcom will then confirm or amend the information request. Ofcom would not normally agree to any subsequent changes to the final request, including the deadline to the final request.
- Information obtained under sections 135 and 136 of the Communications Act will be used in the exercise of Ofcom's functions under Chapter 1 of Part 2 of that Act. Information obtained under section 13A of the Wireless Telegraphy Act will be used to inform and support the management of the radio spectrum.

Section 2

Introduction

- 2.1 Sections 135 and 136 Communications Act 2003 (the "2003 Act") give Ofcom wide powers to require the provision of information for the purpose of carrying out its functions under Chapter 1 of Part 2 of that Act (e.g. to investigate potential breaches of conditions and to carry out market reviews) and also to acquire information for related purposes (e.g. for comparing quality and prices) with respect to electronic communications networks and services. Failure to comply with an information requirement or providing false information may result in financial penalties being imposed by Ofcom and/or criminal proceedings. The 2003 Act also places restrictions on the exercise of these powers which include:
- (a) requests must be proportionate to the uses to which the information is to be put, and
 - (b) persons to whom requests are made must be given a reasonable period to provide the information.
- 2.2 Section 13A of the Wireless Telegraphy Act 1949 (the "1949 Act"), added by section 171 of the 2003 Act, makes similar provision in relation to radio spectrum, although this power is narrower. Under section 13A, Ofcom may require information relating to the establishment, installation or use of radio equipment or installations and any related matters, but for statistical purposes only. Any person who uses or has established or used equipment for wireless telegraphy may be required to provide information. The section 13A power is also subject to restrictions on the exercise of the power.
- 2.3 Ofcom's requirements for information must be proportionate to the use to which the information is to be put. A demand for information by Ofcom must be set out in a notice to be served on the person from whom the information is required. The demand must set out the reasons for requiring the information and the statistical purposes for which it is required.
- 2.4 A person who fails to provide information in accordance with a requirement of Ofcom is guilty of an offence. A defence exists where it was not reasonably practicable to comply with the requirement within the timeframe specified by Ofcom but where the person has taken all reasonable steps to provide the information after the end of the period. A further offence exists where a person supplies false information knowingly or recklessly.
- 2.5 Section 145 of the 2003 Act places a duty on Ofcom to publish a policy statement on how it will exercise its information gathering powers under sections 135 and 136 and how it will use any information obtained in exercise of those powers. When exercising its powers under sections 135 to 144 of the 2003 Act, Ofcom must have regard to this published policy statement. Section 13B of the Wireless 1949 Act makes similar provision in relation to the power in section 13A of the 1949 Act.
- 2.6 This statement sets out Ofcom's proposed policy on the exercise of information gathering powers under sections 135 and 136 of the 2003 Act and section 13A

of the 1949 Act, and the uses to which such information will be put, in accordance with section 145 of the 2003 Act and section 13B of the 1949 Act. This statement supersedes the similar statement on information gathering powers under the 2003 Act published by the Director General of Telecommunications on 25 July 2003.

Section 3

Ofcom's policy

- 3.1 In carrying out its functions under Part 2 of the 2003 Act in relation to electronic communications networks and services and the radio spectrum, Ofcom needs a solid evidence base upon which to base its decisions.
- 3.2 In order to obtain the information it needs in time to meet deadlines imposed under Chapter 1 of Part 2 the 2003 Act in relation to certain of its functions, Ofcom will need to exercise its statutory information gathering powers frequently. As a general rule, Ofcom will seek all the information that it needs to investigate the potential breach of a condition set under section 45 of the 2003 Act (based either on a complaint or "own initiative" investigation) using its statutory powers under sections 135 and 136 of that Act. (In considering disputes between communications providers, Ofcom has separate information gathering powers under section 191 of the 2003 Act.)
- 3.3 Where timescales allow and it is appropriate to do so, Ofcom will send a draft of a statutory information request to the person holding the relevant information and offer three working days for comment, in particular on the relevance of the information sought, other relevant data which may be available and the practicality of providing the information in the given timescale. Following receipt of comments Ofcom will then confirm or amend the information request, generally within two working days. Ofcom would not normally agree to any subsequent changes to the final request, including the deadline to the final request.
- 3.4 In the case of other functions and other types of information which could be required under sections 135 and 136 of the 2003 Act or under section 13A of the 1949 Act, e.g. information to carry out a market review or information required in connection with exercising spectrum management functions, Ofcom hopes that information will be provided on a voluntary basis and that suppliers will continue to contribute to Ofcom's market information programmes in a similar way to those run by the legacy regulators. Ofcom believes that there are benefits to suppliers in terms of efficient and accurate decision making if a regularly updated and comprehensive database is maintained. However, for these other types of functions and information requirements Ofcom will use statutory powers if it considers it appropriate to do so.
- 3.5 As set out in section 137(3) of the 2003 Act and section 13A(2) of the 1949 Act, any statutory demands for information made by Ofcom must be proportionate to the use to which it intends to put the information, and must describe the information required and state the reasons why it is required. Unless the demand is for the purpose of determining who is liable to an administrative charge under section 38 of the 2003 Act (in which case other appropriate methods may be used) any demand must be set out in a notice and be served on the person from whom the information is requested.
- 3.6 Ofcom holds a significant amount of in-house information and collects a wide range of data on various aspects of the industry. Wherever possible, Ofcom will draw from existing information sources to avoid unnecessary duplication of

effort and to minimise the burden placed on those from whom information is requested. Where appropriate, Ofcom will confirm with the source of the information that the information is still up to date and is relevant in the context in which it is to be used. However, despite this comprehensive evidence base there will remain specific areas where it is necessary to collect additional information.

Question 1: Respondents are invited to comment on Ofcom's proposed general policy on the use of statutory information gathering powers.

Section 4

Uses to which Ofcom will put the information requested

- 4.1 The uses to which Ofcom proposes to put information obtained under sections 135 and 136 of the 2003 Act or section 13A of the 1949 Act will follow from the purpose for which that information was obtained, which, as set out in Chapter 2 above, must be explained in any statutory demand for information under those sections.
- 4.2 Information obtained under sections 135 and 136 of the 2003 Act will be used in the exercise of Ofcom's functions under Chapter 1 of Part 2 of that Act. For example, in conducting an investigation into a possible breach of a condition set under section 45 of the 2003 Act, information on product costs may be important. Similarly, when identifying a market or carrying out a significant market power analysis, market share information will be critical.
- 4.3 Information obtained under section 13A of the 1949 Act may be used in various ways to inform and support the management of the radio spectrum in accordance with Ofcom's statutory duties. For example, in carrying out its spectrum functions, Ofcom is specifically required by section 154 of the 2003 Act to have regard in particular to the desirability of promoting economic and other benefits from wireless telegraphy. This could be material in making decisions on how much spectrum to allocate to one service as opposed to another. Economic benefits are often measured in terms of quantities known as consumer surplus and producer surplus. To estimate these quantities, it is necessary to generate supply and demand curves for the service in question. This requires statistical data on levels of use of the spectrum and charges to consumers. To estimate producer surplus, Ofcom would require basic accounting information (including, for example, turnover and cost of sales) related to radio services. Ofcom also has to take account of, in particular, the extent to which spectrum is available for use and the current and expected future demand for spectrum. Statistics on numbers of consumers and levels of traffic carried by particular services can help Ofcom estimate how heavily spectrum is being used and the potential for fitting in new assignments and to forecast future levels of demand in particular frequency bands or for particular services.
- 4.4 Where Ofcom has obtained information for a specified purpose and wishes to use that information for a different purpose, it will first notify the party who provided the information that it may be used for the new purpose and give them an opportunity to comment.

Question 2: Respondents are invited to comment on Ofcom's proposed use of the information that it will gather using its statutory powers.

Section 5

Responding to this consultation

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on Thursday, 3 February 2005**.

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to first martin.hill@ofcom.org.uk.

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Martin Hill
Competition and Markets
3rd Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3990

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

Further information

If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact martin Hill on 020 7783 4334.

Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk. We will do this on receipt of responses, unless respondents request otherwise on their response cover sheet.

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any

confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Ofcom reserves its power to disclose any information it receives where this is required to carry out its functions. Ofcom will exercise due regard to the confidentiality of information supplied.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

Following the end of the consultation period, Ofcom intends to publish a statement in early 2005.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow, including on the length of consultations.

This consultation is shorter than Ofcom's standard 10 week period because - for guidance on valid reasons see Ofcom's published consultation guidelines, available at http://www.ofcom.org.uk/consultations/consult_method/consult_guide.pdf.

Also include here reasons for any other departures from Ofcom's consultation principles.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion:

Philip Rutnam
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3585
Fax: 020 7981 3333
E-mail: philip.rutnam@ofcom.org.uk

Annex 1

Ofcom's consultation principles

Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A1.1 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A1.2 We will be clear about who we are consulting, why, on what questions and for how long.

A1.3 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A1.4 We will normally allow ten weeks for responses, other than on dispute resolution.

A1.5 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A1.6 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A1.7 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 2

Consultation response cover sheet

- A2.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A2.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A2.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Ofcom's policy on information gathering under section 145 of the Communications Act 2003 and section 13B of the Wireless Telegraphy Act 1949

To (Ofcom contact): Martin Hill

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/address/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

Note that Ofcom may still refer to the contents of responses in general terms, without disclosing specific information that is confidential. Ofcom also reserves its powers to disclose any information it receives where this is required to carry out its functions. Ofcom will exercise due regard to the confidentiality of information supplied.

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 3

Consultation questions

Question 1: Respondents are invited to comment on Ofcom's proposed general policy on the use of statutory information gathering powers.

Question 2: Respondents are invited to comment on Ofcom's proposed use of the information that it will gather using its statutory powers.

Annex 4

The relevant legal provisions – Communications Act 2003

135 Information required for purposes of Chapter 1 functions

(1) OFCOM may require a person falling within subsection (2) to provide them with all such information as they consider necessary for the purpose of carrying out their functions under this Chapter.

(2) The persons falling within this subsection are-

- (a) a communications provider;
- (b) a person who has been a communications provider;
- (c) a person who makes, or has made, any associated facilities available to others;
- (d) a person, other than a communications provider, to whom a universal service condition applies or has applied;
- (e) a person who supplies electronic communications apparatus;
- (f) a person not falling within the preceding paragraphs who appears to OFCOM to have information required by them for the purpose of carrying out their functions under this Chapter.

(3) The information that may be required by OFCOM under subsection (1) includes, in particular, information that they require for any one or more of the following purposes-

- (a) ascertaining whether a contravention of a condition or other requirement set or imposed by or under this Chapter has occurred or is occurring;
- (b) ascertaining or verifying the charges payable by a person under section 38;
- (c) ascertaining whether a provision of a condition set under section 45 which is for the time being in force continues to be effective for the purpose for which it was made;
- (d) ascertaining or verifying amounts payable by virtue of a condition falling within section 51(1)(d);
- (e) making a designation in accordance with regulations made under section 66;
- (f) carrying out a review under section 66 or 70;
- (g) identifying markets and carrying out market analyses in accordance with, or for the purposes of, any provision of this Chapter;
- (h) ascertaining whether a question has arisen that gives rise to their duty under section 105;
- (i) considering a matter in exercise of that duty;
- (j) statistical purposes connected with the carrying out of any of OFCOM's functions under this Chapter.

(4) A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.

(5) The powers in this section are subject to the limitations in section 137.

136 Information required for related purposes

(1) OFCOM may require-

(a) a communications provider, or
(b) a person who makes associated facilities available to others,
to provide OFCOM with all such information as they consider necessary for the purpose specified in subsection (2).

(2) That purpose is the carrying out-

(a) with a view to publication, and
(b) in the interest of the end-users of public electronic communications services,
of comparative overviews of the quality and prices of such services.

(3) OFCOM may also require-

(a) a communications provider, or
(b) a person who makes associated facilities available to others,
to provide them, for use for such statistical purposes as they think fit, with information relating to any electronic communications network, electronic communications service or associated facilities.

(4) A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.

(5) The powers in this section are subject to the limitations in section 137.

137 Restrictions on imposing information requirements

(1) This section limits the purposes for which, and manner in which, information may be required under sections 135 and 136.

(2) OFCOM are not to require the provision of information for the purpose of ascertaining whether a contravention of a general condition has occurred, or is occurring, unless-

- (a) the requirement is imposed for the purpose of investigating a matter about which OFCOM have received a complaint;
- (b) the requirement is imposed for the purposes of an investigation that OFCOM have decided to carry out into whether or not the general condition in question has been complied with;
- (c) the condition in question is one which OFCOM have reason to suspect is one that has been or is being contravened; or
- (d) the condition in question is one falling within section 51(1)(d).

(3) OFCOM are not to require the provision of information under section 135 or 136 except-

- (a) by a demand for the information that describes the required information and sets out OFCOM's reasons for requiring it; and
- (b) where the making of a demand for the information is proportionate to the use to which the information is to be put in the carrying out of OFCOM's functions.

(4) The reasons for requiring information for statistical purposes under section 135 or 136 must set out the statistical purposes for which the information is required.

(5) Except in the case of a demand made in the manner authorised by subsection (6), a demand for information required under section 135 or 136 must be contained in a notice served on the person from whom the information is required.

(6) In the case of information required by OFCOM for the purpose of ascertaining who is liable to charges under section 38, the demand may-

- (a) be made by being published in such manner as OFCOM consider appropriate for bringing it to the attention of the persons who are described in the demand as the persons from whom the information is required; and
- (b) take the form of a general demand for a person so described to provide information when specified conditions relevant to his liability to such charges are satisfied in his case.

138 Notification of contravention of information requirements

(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a requirement imposed under section 135 or 136, they may give that person a notification under this section.

(2) A notification under this section is one which-

- (a) sets out the determination made by OFCOM;
- (b) specifies the requirement and contravention in respect of which that determination has been made; and
- (c) specifies the period during which the person notified has an opportunity of doing the things specified in subsection (3).

(3) Those things are-

- (a) making representations about the matters notified; and
- (b) complying with any notified requirement of which he remains in contravention.

(4) Subject to subsections (5) to (7), the period for doing those things must be the period of one month beginning with the day after the one on which the notification was given.

(5) OFCOM may, if they think fit, allow a longer period for doing those things either-

- (a) by specifying a longer period in the notification; or
- (b) by subsequently, on one or more occasions, extending the specified period.

(6) The person notified shall have a shorter period for doing those things if a shorter period is agreed between OFCOM and the person notified.

(7) The person notified shall also have a shorter period if-

- (a) OFCOM have reasonable grounds for believing that the contravention is a repeated contravention;
- (b) they have determined that, in those circumstances, a shorter period would be appropriate; and
- (c) the shorter period has been specified in the notification.

(8) A notification under this section-

- (a) may be given in respect of more than one contravention; and
- (b) if it is given in respect of a continuing contravention, may be given in respect of any period during which the contravention has continued.

(9) Where a notification under this section has been given to a person in respect of a contravention of a requirement, OFCOM may give a further notification in respect of the same contravention of that requirement if, and only if-

- (a) the contravention is one occurring after the time of the giving of the earlier notification;
- (b) the contravention is a continuing contravention and the subsequent notification is in respect of so much of a period as falls after a period to which the earlier notification relates; or
- (c) the earlier notification has been withdrawn without a penalty having been imposed in respect of the notified contravention.

(10) For the purposes of this section a contravention is a repeated contravention, in relation to a notification with respect to that contravention, if-

- (a) a previous notification under this section has been given in respect of the same contravention or in respect of another contravention of the same requirement; and
- (b) the subsequent notification is given no more than twelve months after the day of the making by OFCOM of a determination for the purposes of section 139(2) that the contravention to which the previous notification related did occur.

139 Penalties for contravention of information requirements

(1) This section applies where-

- (a) a person ("the notified person") has been given a notification under section 138;

- (b) OFCOM have allowed the notified person an opportunity of making representations about the matters notified; and
 - (c) the period allowed for the making of the representations has expired.
- (2) OFCOM may impose a penalty on the notified person if-
- (a) they are satisfied that he has, in one or more of the respects notified, been in contravention of the requirement notified under section 138;
 - (b) he has not, during the period allowed under that section, complied with the notified requirement; and
 - (c) no proceedings for an offence under section 144 have been brought against the notified person in respect of the contravention.
- (3) Where a notification under section 138 relates to more than one contravention, a separate penalty may be imposed in respect of each contravention.
- (4) Where such a notification relates to a continuing contravention, no more than one penalty may be imposed in respect of the period of contravention specified in the notification.
- (5) The amount of a penalty imposed under this section is to be such amount not exceeding £50,000 as OFCOM determine to be both-
- (a) appropriate; and
 - (b) proportionate to the contravention in respect of which it is imposed.
- (6) In making that determination OFCOM must have regard to-
- (a) any representations made to them by the notified person; and
 - (b) any steps taken by him towards complying with the requirements contraventions of which have been notified to him under section 138.
- (7) Where OFCOM impose a penalty on a person under this section, they shall-
- (a) within one week of making their decision to impose the penalty, notify that person of that decision and of their reasons for that decision; and
 - (b) in that notification, fix a reasonable period after it is given as the period within which the penalty is to be paid.
- (8) A penalty imposed under this section-
- (a) must be paid to OFCOM; and
 - (b) if not paid within the period fixed by them, is to be recoverable by them accordingly.
- (9) The Secretary of State may by order amend this section so as to substitute a different maximum penalty for the maximum penalty for the time being specified in subsection (5).
- (10) No order is to be made containing provision authorised by subsection (9) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

140 Suspending service provision for information contraventions

(1) OFCOM may give a direction under this section to a person who is a communications provider or who makes associated facilities available ("the contravening provider") if they are satisfied-

- (a) that he is or has been in serious and repeated contravention of requirements imposed under sections 135 and 136, or either of them;
- (b) the requirements are not requirements imposed for purposes connected with the carrying out of OFCOM's functions in relation to SMP apparatus conditions;
- (c) that an attempt, by the imposition of penalties under section 139 or the bringing of proceedings for an offence under section 144, to secure compliance with the contravened requirements has failed; and
- (d) that the giving of the direction is appropriate and proportionate to the seriousness (when repeated as they have been) of the contraventions.

(2) A direction under this section is-

- (a) a direction that the entitlement of the contravening provider to provide electronic communications networks or electronic communications services, or to make associated facilities available, is suspended (either generally or in relation to particular networks, services or facilities); or
- (b) a direction that that entitlement is restricted in the respects set out in the direction.

(3) A direction under this section-

- (a) must specify the networks, services and facilities to which it relates; and
- (b) except so far as it otherwise provides, takes effect for an indefinite period beginning with the time at which it is notified to the person to whom it is given.

(4) A direction under this section-

- (a) in providing for the effect of a suspension or restriction to be postponed, may provide for it to take effect only at a time determined by or in accordance with the terms of the direction; and
- (b) in connection with the suspension or restriction contained in the direction or with the postponement of its effect, may impose such conditions on the contravening provider as appear to OFCOM to be appropriate for the purpose of protecting that provider's customers.

(5) Those conditions may include a condition requiring the making of payments-

- (a) by way of compensation for loss or damage suffered by the contravening provider's customers as a result of the direction; or
- (b) in respect of annoyance, inconvenience or anxiety to which they have been put in consequence of the direction.

(6) If OFCOM consider it appropriate to do so (whether or not in consequence of any representations or proposals made to them), they may revoke a direction under this section or modify its conditions-

- (a) with effect from such time as they may direct;
- (b) subject to compliance with such requirements as they may specify; and
- (c) to such extent and in relation to such networks, services or facilities, or parts of a network, service or facility, as they may determine.

(7) For the purposes of this section there are repeated contraventions by a person of requirements imposed under sections 135 and 136, or either of them, to the extent that-

- (a) in the case of a previous notification given to that person under section 138, OFCOM have determined for the purposes of section 139(2) that such a contravention did occur; and
 - (b) in the period of twelve months following the day of the making of that determination, one or more further notifications have been given to that person in respect of contraventions of such requirements;
- and for the purposes of this subsection it shall be immaterial whether the notifications related to the same contravention or to different contraventions of the same or different requirements or of requirements under different sections.

141 Suspending apparatus supply for information contraventions

(1) OFCOM may give a direction under this section to a person who supplies electronic communications apparatus ("the contravening supplier") if they are satisfied-

- (a) that he is or has been in serious and repeated contravention of requirements imposed under section 135;
- (b) that an attempt, by the imposition of penalties under section 139 or the bringing of proceedings for an offence under section 144, to secure compliance with the contravened requirements has failed; and
- (c) that the giving of the direction is appropriate and proportionate to the seriousness (when repeated as they have been) of the contraventions.

(2) A direction under this section is-

- (a) a direction to the contravening supplier to cease to act as a supplier of electronic communications apparatus (either generally or in relation to apparatus of a particular description); or
- (b) a direction imposing such restrictions as may be set out in the direction on the supply by that supplier of electronic communications apparatus (either generally or in relation to apparatus of a particular description).

(3) A direction under this section takes effect, except so far as it otherwise provides, for an indefinite period beginning with the time at which it is notified to the person to whom it is given.

(4) A direction under this section-

- (a) may provide for a prohibition or restriction to take effect only at a time determined by or in accordance with the terms of the direction; and
 - (b) in connection with a prohibition or restriction contained in the direction or with the postponement of its effect, may impose such conditions on the contravening supplier as appear to OFCOM to be appropriate for the purpose of protecting that supplier's customers.
- (5) Those conditions may include a condition requiring the making of payments-
- (a) by way of compensation for loss or damage suffered by the contravening supplier's customers as a result of the direction; or
 - (b) in respect of annoyance, inconvenience or anxiety to which they have been put in consequence of the direction.
- (6) If OFCOM consider it appropriate to do so (whether or not in consequence of representations or proposals made to them), they may revoke a direction under this section or modify its conditions-
- (a) with effect from such time as they may direct;
 - (b) subject to compliance with such requirements as they may specify; and
 - (c) to such extent and in relation to such apparatus or descriptions of apparatus as they may determine.
- (7) For the purposes of this section contraventions by a person of requirements imposed under section 135 are repeated contraventions if-
- (a) in the case of a previous notification given to that person under section 138, OFCOM have determined for the purposes of section 139(2) that such a contravention did occur; and
 - (b) in the period of twelve months following the day of the making of that determination, one or more further notifications have been given to that person in respect of contraventions of such requirements;
- and for the purposes of this subsection it shall be immaterial whether the notifications related to the same contravention or to different contraventions of the same or different requirements.

142 Procedure for directions under ss. 140 and 141

- (1) Except in an urgent case, OFCOM are not to give a direction under section 140 or 141 unless they have-
- (a) notified the contravening provider or contravening supplier of the proposed direction and of the conditions (if any) which they are proposing to impose by that direction;
 - (b) provided him with an opportunity of making representations about the proposals and of proposing steps for remedying the situation; and
 - (c) considered every representation and proposal made to them during the period allowed by them for the contravening provider or the contravening supplier to take advantage of that opportunity.

- (2) That period must be one ending not less than one month after the day of the giving of the notification.
- (3) As soon as practicable after giving a direction under section 140 or 141 in an urgent case, OFCOM must provide the contravening provider or contravening supplier with an opportunity of-
- (a) making representations about the effect of the direction and of any of its conditions; and
 - (b) proposing steps for remedying the situation.
- (4) A case is an urgent case for the purposes of this section if OFCOM-
- (a) consider that it would be inappropriate, because the contraventions in question fall within subsection (5), to allow time, before giving a direction under section 140 or 141, for the making and consideration of representations; and
 - (b) decide for that reason to act in accordance with subsection (3), instead of subsection (1).
- (5) The contraventions fall within this subsection if they have resulted in, or create an immediate risk of-
- (a) a serious threat to the safety of the public, to public health or to national security;
 - (b) serious economic or operational problems for persons (apart from the contravening provider or contravening supplier) who are communications providers or persons who make associated facilities available; or
 - (c) serious economic or operational problems for persons who make use of electronic communications networks, electronic communications services or associated facilities.
- (6) In this section-
- "contravening provider" has the same meaning as in section 140; and
 - "contravening supplier" has the same meaning as in section 141.

143 Enforcement of directions under ss. 140 and 141

- (1) A person is guilty of an offence if he provides an electronic communications network or electronic communications service, or makes available any associated facility-
- (a) while his entitlement to do so is suspended by a direction under section 140; or
 - (b) in contravention of a restriction contained in such a direction.
- (2) A person is guilty of an offence if he supplies electronic communications apparatus-
- (a) while prohibited from doing so by a direction under section 141; or
 - (b) in contravention of a restriction contained in such a direction.

(3) A person guilty of an offence under this section shall be liable-

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(4) Sections 94 to 99 apply in relation to a contravention of conditions imposed by a direction under section 140 or 141 as they apply in relation to a contravention of conditions set under section 45.

144 Offences in connection with information requirements

(1) A person who fails to provide information in accordance with a requirement of OFCOM under section 135 or 136 is guilty of an offence and shall be liable-

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(2) In proceedings against a person for an offence under subsection (1) it shall be a defence for that person to show-

- (a) that it was not reasonably practicable for him to comply with the requirement within the period specified by OFCOM; but
- (b) that he has taken all reasonable steps to provide the required information after the end of that period.

(3) A person is guilty of an offence if-

- (a) in pursuance of any requirement under section 135 or 136, he provides any information that is false in any material particular; and
- (b) at the time he provides it, he either knows it to be false or is reckless as to whether or not it is false.

(4) A person guilty of an offence under subsection (3) shall be liable-

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

(5) Proceedings for an offence under subsection (1) may be brought in respect of a contravention by a person of a requirement imposed under section 135 or 136 only if-

- (a) OFCOM have given the person a notification under section 138 in respect of that contravention;
- (b) the period allowed under that section for doing the things mentioned in subsection (3) of that section has expired without the required information having been provided; and
- (c) OFCOM have not imposed a financial penalty under section 139 in respect of that contravention.

145 Statement of policy on information gathering

(1) It shall be the duty of OFCOM to prepare and publish a statement of their general policy with respect to-

- (a) the exercise of their powers under sections 135 to 136; and
- (b) the uses to which they are proposing to put information obtained under those sections.

(2) OFCOM may from time to time revise that statement as they think fit.

(3) Where OFCOM make or revise their statement of policy under this section, they must publish that statement or (as the case may be) the revised statement in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

(4) It shall be the duty of OFCOM, in exercising the powers conferred on them by sections 135 to 144 to have regard to the statement for the time being in force under this section.

Annex 5

The relevant legal provisions – Wireless Telegraphy Act 1949

Sections 13A and 13B were added to the Wireless Telegraphy Act 1949 by section 171(1) of the Communications Act 2003.

13A Information requirements

(1) Subject to the following provisions of this section, OFCOM may require a person who is using or has established, installed or used a station or apparatus for wireless telegraphy to provide OFCOM with all such information relating to-

- (a) the establishment, installation or use of the station or apparatus, and
 - (b) any related matters,
- as OFCOM may require for statistical purposes.

(2) OFCOM are not to require the provision of information under this section except-

- (a) by a demand for the information that sets out OFCOM's reasons for requiring the information and the statistical purposes for which it is required; and
- (b) where the making of a demand for that information is proportionate to the use to which the information is to be put in the carrying out of OFCOM's functions.

(3) A demand for information required under this section must be contained in the notice served on the person from whom the information is required.

(4) A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.

(5) A person who fails to provide information in accordance with a requirement of OFCOM under this section is guilty of an offence.

(6) In proceedings against a person for an offence under subsection (1) it shall be a defence for that person to show-

- (a) that it was not reasonably practicable for him to comply with the requirement within the period specified by OFCOM; but
- (b) that he has taken all reasonable steps to provide the required information after the end of that period.

(7) A person is guilty of an offence if-

- (a) in pursuance of any requirement under this section, he provides information that is false in any material particular; and

- (b) at the time he provides it, he either knows it to be false or is reckless as to whether or not it is false.

13B Statement of policy on information gathering

(1) It shall be the duty of OFCOM to prepare and publish a statement of their general policy with respect to-

- (a) the exercise of their powers under section 13A; and
- (b) the uses to which they are proposing to put information obtained under that section.

(2) OFCOM may from time to time revise that statement as they think fit.

(3) Where OFCOM make or revise their statement of policy under this section, they must publish that statement or (as the case may be) the revised statement in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

(4) It shall be the duty of OFCOM, in exercising the powers conferred on them by section 13A, to have regard to the statement for the time being in force under this section.

Section 171(2) of the Communications Act 2003 inserts the following additional text into section 14(1A) of the Wireless Telegraphy Act 1949 (summary offences carrying a maximum fine of level 3 on the standard scale):

“(ea) any offence under section 13A(1) of this Act; or”